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No. 85-6461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EARLINE MARTIN

Petitioner,

v.

STATE OF OHIO

Respondent.

On Writ Of Certiorari To The Ohio Supreme Court

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a state can, consistent with the constitution, require an accused to bear the burden of proof on the issue of self-defense.

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OPINIONS BELOW

The Opinion of the Ohio Supreme Court is reported as *State* v. *Martin*, 23 Ohio St. 3d 91 (1986), and is set forth in the *Joint Appendix* to this Brief at pp. 36 to 45. The Journal Entry and Opinion of the Ohio Court of Appeals, which was not officially reported, is included in the *Joint Appendix*, at pp. 29 to 35. No opinion was delivered by the trial court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Ohio Supreme Court was entered on January 15, 1986. The Petition For Writ of Certiorari was docketed in this Court on March 4, 1986 and was granted on April 21, 1986.

The jurisdiction of the Court rests upon Title 28 U.S.C., § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are set out in the Addendum to this Brief at pp. Add.1 to Add.3. Those being referred to are:

(1) United States Constitution—Amendment XIV.

(2) Constitution of the State of Ohio—Article I, Section 1; Article I, Section 4; Article 4, Section 20.

(3) Revised Code of Ohio, § 2903.01.

(4) Revised Code of Ohio, § 2903.02.

(5) Revised Code of Ohio, § 2903.03.

(6) Revised Code of Ohio, § 2901.05.

(7) Revised Code of Ohio, § 2901.21 (A) & (C).

(8) Revised Code of Ohio, § 2929.71.

STATEMENT OF THE CASE[1]

Earline Martin, the petitioner herein, was found guilty by a jury "as charged by the Judge" of Aggravated Murder (under favor of R.C. of Ohio, §§ 2903.01 and 2929.71). She was given a life sentence. The appeal on questions of law from the verdict and final order entered by the trial court resulted in an affirmance of her conviction and the sentence imposed.

The facts in this case, as distilled by the Ohio Supreme Court, show that:

> On the morning of July 21, 1983, appellant, Earline Martin, shot to death her husband, sixty-eight-year-old Walter C. Martin, Sr., after an argument over grocery money. Appellant was arrested and charged with aggravated murder pursuant to R.C. 2903.01.
>
> Appellant pleaded not guilty and, at trial, raised the affirmative defense of self-defense. Appellant took the stand and testified she feared for her life because the victim had struck her just prior to the fatal shooting. In closing argument, the prosecutor characterized appellant's testimony as a sham, amounting to a lie.
>
> Appellant requested and received jury instructions on self-defense. At the close of evidence and argument, the trial judge instructed the jury on the offense of aggravated murder and the lesser-included offenses of murder and voluntary manslaughter. The trial court instructed the jury that it should not consider any lesser-included offense if the jury first

---

[1] The citations to *State* v. *Wealthy Johnson* and *State* v. *Tuncle* are to unreported decisions by our Court of Appeals. Both of these Opinions have been lodged with the Court.

> found that the state had proved beyond a reasonable doubt all of the elements of the offense of aggravated murder.

J.A. at 36-37; 21 Ohio St. 3d, at 91-92.

The Record also shows the trial court, despite our very precise objections and exceptions, instructed the jury that to prevail on the basis of her self-defense plea, our petitioner was required to actually prove her innocence. Here reference is being made to the following segments of the Court's self-defense instructions by which Earline Martin was victimized:

> The Defendant in this case has claimed the affirmative defense of self-defense, which I am about to define for you. . . . As required in the affirmative defense of self-defense, *the burden of proof is upon the Defendant to prove self-defense* by what we call a preponderance of the evidence.
>
> * * *
>
> To establish self-defense, the following elements must be shown:
>
> The Defendant was not at fault in creating the situation giving rise to the argument; (2) the Defendant had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of such force; and (3) the Defendant must not have violated any duty to retreat or avoid the danger.
>
> * * *
>
> *The Defendant must establish that the other party was the aggressor* and that the Defendant did not herself provoke and cause the injury.
>
> * * *

> I have indicated to you that *the burden of proof as relates to the elements that makeup self-defense is upon the Defendant, Earline Martin.* The degree of proof is what we call by the preponderance of the evidence.
>
> * * *
>
> *If the weight of the evidence is equally balanced* or if you are unable to determine which side of the affirmative defense has the preponderance, *then the Defendant has not established such affirmative defense.*

J.A. at 19 to 21. (Emphasis supplied.)

SUMMARY OF THE ARGUMENTS

History could very well record that the selection of this particular case to resolve the issues here involved was both, wise and timely. For the issue as to whether a State can require an accused to prove their innocence when they defend solely on the grounds of self-defense could not have gone away simply because the Ohio Supreme Court, in a five to two decision, has apparently satisfied itself that such is the case.

Moreover, the aptness of the Court's selection of this particular case will be applauded by those of us who are convinced the Ohio Supreme Court and its various Appellate Courts (including the one below) are dead wrong in their analysis of these issues. Indeed, the express reliance in majority Opinions on *State* v. *Moran*, infra, is really a godsend because of the misguided focus it gives to our self-defense arguments. Significantly, our Court of Appeals specifically recognized that it had already "dealt with a nearly identical [issue] in *State* v. *Moran*, No. 45879 . . . ." (J.A. at 32). And, the Supreme Court of Ohio likewise cited *State* v. *Moran* in support of its ultimate

thesis (*id.*, at 40; *State* v. *Martin*, 23 Ohio St. 3d, at 94), which fact should weigh heavily in the direction of a resolution of this cause in favor of our petitioner.

It was, of course, in *Moran* v. *Ohio*, ___ U.S. ___, 105 S.Ct. 350 (1984), that counsel apparently got the attention of some of the members of this Court. For it was here that Justice Brennan, in a dissent from the denial of certiorari, articulated an analysis of this issue that can be favorably compared to that urged in the various dissenting opinions rendered in the reviewing Courts below. It is substantially this same position that our petitioner has taken in her discussions of these various issues.

While no abridgement of the specific analysis being referred to can do it justice, the following selected segments from *Moran* seem especially apt:

> The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code § 2903.01(a) (1982). Under Ohio law, an assertion of self-defense requires proof *inter alia* that the defendant "was in *imminent* danger of death or great bodily harm." *State* v. *Robbins*, 58 Ohio St. 2d 74, 388 N.E. 2d, 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design." (*Id.*, at 353.)
>
> * * *
>
> To assert (as the Ohio appellate court here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was

> done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted of an immediate response to a murderous attack upon him. See *Patterson*, supra, at 210; *Solem* v. *Helm*, 463 U.S. 277 (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge—an element required by the Constitution even if not by the State's enacted or decisional law.

Moran v. *Ohio*, ___ U.S. ___, 105 S. Ct., at 354-355. (Dissenting Opinion.)

When we add to the above quote this Court's recent decision of *Francis* v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985), which makes an analysis similar to the ones made in the *Moran* dissent and by the dissenting Judges on the Courts below, the die seemingly has been cast. And, this in favor of an outright repudiation and rejection of the self-defense theories espoused by the majorities below.

Another argument made below will contend that from a simple analytical prospective it seems clear enough that when one claims self-defense against a murder charge, he does not necessarily concede that he intended to kill. Here, of course, our reference is to the statement in *Martin* that, in raising the defense with which we are here concerned, the accused "*admits* the facts claimed by the prosecution and then relies on independent facts or circumstances which . . . [he or she] claims exempts . . . them from liability" (J.A. at 40; 23 Ohio St. 3d, at 94). (Emphasis supplied.)

The apparent flaw in the postulate set forth above will be shown to be its failure to recognize that while "one can

shoot to kill in self-defense," they can also "shoot to wound in self-defense, shoot to frighten in self-defense, or even shoot reactively with no specific purpose," *Mason* v. *Balkcom*, 669 F.2d 222, 227 (5th Cir. 1982).

A most critical premise for the arguments made in this Brief recognizes it to be a fact that forcing a defendant to bear the burden of proof on the issue of self-defense is, both, conceptually and functionally, the same as requiring the State to prove the lack of self-defense. Because of the danger that *Winship* could be circumvented if a State were free of constitutional restraints in defining crimes and allocating burdens of proof and the like, it is here being contended that the required analysis cannot turn simply on what the State may label as an affirmative defense or exclude as an element of an offense. Rather, the apt questions should seek a determination as to whether any such labels as the State may use in these situations increases the defendant's burdens or lessens, or eliminates, the State's burden of proof on an issue that is critical to criminal culpability.

ARGUMENT NO. I

A State Cannot Constitutionally Require Accused Persons Who Defend Against A Homicide Charge Solely On The Grounds Of Self-Defense To Prove Themselves Not Guilty.

Our analysis here starts and ends with an idea that is yet to be rejected by this Court—that is, that a State may not, consistent with the due process clause, impose on a defendant in a criminal trial, the burden of persuasion with respect to the plea of self-defense. At the heart of our various contentions is our belief that the constitutional limitations on the allocation of a particular burden of persuasion with reference to what a State may characterize and manipulate as "affirmative" defenses derive

from the rule articulated in *In Re Winship*, 397 U.S. 358, 364 (1970). There this Court held that a defendant in a criminal case may not be constitutionally convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.

Under this principle the concept of self-defense (because it brings into question, or seeks to negate, an element of the crime charged) must be disproven beyond a reasonable doubt. *Patterson* v. *New York*, 432 U.S. 197, 202-205 (1977). Additionally, simple logic supports the idea that the State "may not place the burden of persuasion on [an] issue upon the defendant if the truth of the defense would necessarily negate an essential element of the crime charged." *Holloway* v. *McElroy*, 632 F.2d 605, 625 (5th Cir. 1980).

Counsel's serious disagreement with the *ad hoc* reasoning patterns relied on for the arguments made in the opinions below, *i.e.*, that the lack of self-defense is not an element of the charged offense, should be viewed as total. Indeed, our position is that surely this Court could have only intended *Patterson* v. *New York*, to be properly regarded as dealing with defenses of mitigation, such as heat of passion and duress, which go only to the distinction between Murder and Manslaughter. Yet, despite this apparently valid thesis, the *majority* opinions below show an obvious refusal to reckon with the critical distinction between defenses in mitigation *and* those of justification—such as the claim of self-defense.

This analysis takes us then to the opinion made by our Supreme Court in *State* v. *Martin*. This case, to be sure, is now being regarded by the Courts in Ohio as conclusive support for the flawed thesis that the State *can* with impunity constitutionally require an accused to prove he

or she acted in self-defense. Cf., *State* v. *Jackson*, 22 Ohio St. 3d 281 (1986), decided two months after *Martin*. Also see *White* v. *Arn*, 788 F.2d 338, 344 n.8 and 345 n.10 (6th Cir. 1986) and *Wilson* v. *McMacken*, 786 F.2d 216, 219 (6th Cir. 1986). The fact that the asserted basis for the untenable positions taken therein is said to be *Patterson* v. *New York*, is, of course, rather startling. This is so because it can hardly be that *Patterson* is properly regarded as authorizing Ohio to punish as a murderer one who commits an entirely lawful act—that is, kill another in self-defense. Even this is not all. It is most difficult to understand how principles established in connection with mitigation defenses can be deemed controlling in a self-defense analysis. Yet, such was deemed to be the case by our Court of Appeals in *State* v. *Davis*, 8 Ohio App. 3d 205 (1982).

A study of the analysis made by these Courts (including the various cases relied on to defend their thesis) quickly shows it distills into an unconstitutional concept. Simply stated, the clear cut indications are that the Ohio Courts have somehow convinced themselves what is to be regarded as elements of *any* crime can be freely assigned by our Courts or by our legislature. And, these Courts must likewise be convinced that *Patterson*, although based on a *gratuitous mitigation defense*, which was the product of legislative grace, controls even where the defense raised is an absolute one as distinguished from merely a partial defense.

To be sure, self-defense is *not* as was said by our court of Appeals in *State* v. *Davis*, 8 Ohio App. 3d at 209, a "confession and avoidance" type defense as was the case in *Patterson*. It is this indelible fact that the Ohio courts are apparently unwilling to fully credit. On the other hand, if our Courts are right, and the State simply by the way it

defines a particular crime can make an element out of the lack of intent, or the lack of an act, or even mis-identification, then indeed it can even make it a crime to kill in self-defense. On the other hand, arguably it has already come very close to doing just that by making it an offense to simply cause a death—which is what happens in most self-defense homicide cases. See R.C. of Ohio, § 2903.02.

At the risk of sounding somewhat trite, it is fundamental due process that renders it impossible for, either, the Ohio Legislature or its Courts to make it a crime to kill in self-defense. While this is certainly true, a *majority* of the members of the Ohio Supreme Court and our Court of Appeals seem totally oblivious to the fact that this court in *Patterson* (upon which both claim to rely) issued the stern warning that it did "not intend *Mullaney*" to be "[c]arried to its logical extreme . . .", *Patterson* v. *New York*, 432 U.S., 214-215, n.15. Indeed, despite the above indicated cogent language, the Courts below were seemingly quite willing to take the *Patterson* rationale even *beyond* its "logical extreme." Also see, *State* v. *Davis*, 8 Ohio App. 3d 205 (1982). Cf., *State* v. *Gideon*, 52 Ohio App. 2d 70, 74 (1977), with the unreported decisions by our Court of Appeals in *State* v. *Johnson* (Cuy. Cty. Ct. App. 1981), Case No. 42846 and *State* v. *Tuncle* (Cuy. Cty. Ct. App. 1979), Case No. 38424. (The *Johnson* and *Tuncle* decisions have been lodged with this Court.)

Our point here, simply put, is that if Ohio can require a defendant to prove self-defense simply by the way it defines the crime involved, and if self-defense can be properly analogized to the gratuitous defense involved in *Patterson* (which defense arguably could be totally eliminated by the simple device of abolishing the statute that created it), then it follows Ohio could actually eliminate the defense itself and make it a crime to kill in self-

defense. If this is so, then surely this Court should make that point very clear to those of us who had regarded the right of self-defense as being the one right that was truly "inalienable."

Another point that should be noted here is that prior to the Ohio Supreme Court's decision to review this case, counsel had routinely made the argument that it was most unfortunate they had not ruled directly on the issue as to whether an accused can be required to prove himself not guilty when self-defense is raised. It was originally our hope that the Ohio Supreme Court would surely credit the following insuperable analysis, which is being submitted to this Court. *First*, the mere fact that one fires a gun and thereby kills another does not, alone, establish his guilt of any criminal offense. *Next*, "murder" and "manslaughter" are specific intent crimes. The intent involved in those crimes must be proven beyond a reasonable doubt by the prosecution. More simply put, the intent required to be proven must surely be a *criminal* intent. See *United States* v. *Corrigan*, 548 F.2d 879 (10th Cir. 1977) (". . . The defense of self-defense is directed toward negating the element of criminal intent," *id.*, at 883).

Viewed in this light, it makes no sense to argue that Earline Martin could rightly be required to prove that she lacked criminal intent or suffer a guilty verdict. Since the prosecution's burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is necessarily diluted unless the prosecution is required to prove the existence of such intent. Undeniably then, the criminal intent aspect of any felonious homicide is irreconcilable with self-defense. This being so, it follows that requiring one to disprove criminal intent offends fundamental criteria. *Isaac* v. *Engle*, 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion).

Based on the above analysis, what must be credited here is the fact that Earline Martin never contended she did not intend to shoot the decedent. Rather, it was maintained she shot *without* any criminal intent. See, *Morissette* v. *United States*, 342 U.S. 246 (1952), where this Court reasoned that the admittedly intentional act of taking certain government property could not be supposed by the Court to have been the only intent involved. Further, this Court reasoned that the intent the accused admittedly had was only criminal if it was so determined after a consideration of all the testimony (including the defense evidence that the taking had not been with any criminal intent) and all of the acts and circumstances surrounding the taking. *Id.*, at 276. Also see, *United States* v. *Gypsum Co.*, 438 U.S. 422, 429-430 (1978), and *Holloway* v. *McElroy, 632 F.2d 605, 618 (5th Cir. 1980).*

Even this is not all. Our Court's reliance on *Patterson* as authorizing the evisceration of the concept of self-defense, cannot survive for other equally cogent reasons. First it should be noted that the murder statutes under which *Patterson* was tried expressly provided:

> [I]t is an affirmative defense [to murder] that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

People v. *Patterson*, 39 N.Y. 2d 288, 347 N.E. 2d 898, 900 n.1 (1976). We also know from the State Court's Opinion in the *Patterson* case that:

> [t]he [trial] court instructed the jury that '[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a *miti-*

> *gating* circumstance reducing murder to manslaughter in the first degree.'
>
> The court went on to explain that '*[t]his does not mean that the emotional disturbance exonerates the killer*, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder.'

Id., at 347 N.E. 2d, at 901. (Emphasis supplied.)

It is clear then that only by resort to arbitrary reasoning patterns, such as those articulated in the Courts below, especially by the Ohio Supreme Court (J.A. at 36; 23 Ohio St. 3d, at 93), does one fail to recognize there is no valid way to effectively analogize the murder-manslaughter relationship created by the New York statutes to Ohio's murder and manslaughter statutes. The same is true of the relationship between Ohio's homicide concepts and the inalienable right of self-defense that is part of our rich heritage. Having said that, it may suffice here to note that in New York (and this was the point critically addressed in *Patterson*, and made most clear by the above quotes from the jury charge given in the trial of that case) an accused by proving he acted under an extreme emotional disturbance only reduces his crime from murder to manslaughter, *Id.*, 432 U.S. at 205-206. For our part, it is this cogent point that most of the judges in Ohio (including those who decided *Martin*) simply refuse to reckon with.

Indeed in our judgment, the point made by Judge Jackson, one of the dissenters below, could not be better stated than was done by him in *State* v. *Wealthy Johnson* (Court of Appeals, Cuy. Cty. No. 42846, unreported). There it was stated:

> "We live in a time of increasing violence and crime. Justice Rehnquist recently observed that the law enforcement authorities 'cannot protect the lives of employees of this very court [The United States Supreme Court] who live four blocks from the building in which we sit . . .' *Coleman* v. *Balkcom*, [451] U.S. [949], (dissent from denial of certiorari). Yet under the position taken by the majority any of these employees, even the Justices themselves, if attacked by a criminal who they killed in self-defense, would be required to prove their innocence. We are also informed that the police of this country are themselves endangered and forced to kill hundreds of individuals a year in self-defense. . . . Under the majority's concept of the issue each of the police are subject to indictment for murder and released only if they can prove their innocence. We know that individuals are assaulted daily in our city and that the use of self-defense may in many instances be the only way to preserve the life of the law abiding citizen. Yet, the clear import of the majority decision as I read it, holds that such a citizen, acting in self-defense, must carry the burden of proving that he acted in self-defense, or be found guilty. In my humble opinion, this is contrary not only to the Ohio and United States Constitutions, but also to logic and common sense.
>
> "I am reconciled to the possibility in the present judicial climate that the position of majority in the case at bar may prevail: that citizens will lose their inalienable right of self-defense, or that, when acting upon the lawful exercise of that right, they will be required to prove their innocence. Nevertheless, if that position does prevail, it will do so without my support and over my most vigorous dissent."

Id., Dissenting Opinion. (Cited with approval by the author thereof in his dissent in Appellate Court's review of this cause, J.A., at 34.)

The point made above by our Judge Jackson really crystallizes the inaptness of the reasoning resorted to by the Ohio Supreme Court in their resolution of this petitioner's appeal in *State* v. *Martin* and in its lineal descendant *State* v. *Jackson*, both *supra*. Obviously if the reasoning relied on by those Courts is sound, then this Court really ought to say so in no uncertain terms. But, of course, this is not likely to happen for this Court will quickly realize that while arguments based on analogy are usually appealingly simple, at best such arguments, rather than prove anything, only enlighten and clarify. Thus they really should be used as a reinforcement for other and better reasoned arguments.

A. By Asserting The Defense Of Self-Defense An Accused Does Not, And Cannot Be Required To, Admit The "Facts Claimed By The Prosecution".

From a historical prospective, one can note that the elements of Ohio's First Degree Murder statute, which were superseded by the Aggravated Murder statute Earline Martin was convicted of (*i.e.*, R.C. of Ohio, § 2903.01), did contain a malice element. The statute being referred to contained the added element of "deliberate and premeditated malice." R.C. of Ohio, § 2901.01. (Page's 1953.) See *State* v. *Jenkins*, 48 Ohio App. 2d 99, n. 1 (1976). What is, of course, most obvious from the present statute (in addition to a redefinition and restructuring of the comparable homicide offenses involved) is the very substantial lessening of the burden of proof the prosecution must satisfy to convict one accused of committing the most serious of the State's criminal offenses. While this is obviously so in any homicide case, it is all the moreso when one defends solely on the grounds of self-defense. In our judgment, it is here that the flawed reasoning patterns adopted by the Ohio Courts are most manifest.

At least this much seems certain, "proof of self-defense would clearly negate . . . [any] malice element" of murder. *Hopper* v. *Perini*, 641 F.2d 444, 446 (6th Cir. 1980). With that as a given, one really gets a measure of significantly relevant insight into what may be the real cause of the obvious confoundment evidenced in the opinions below affirming the conviction under review in this cause. Here our reference is to what started out as a *dictum* in *State* v. *Poole*, 33 Ohio St. 2d 18 (1973), and which was ultimately gospelized into an absolute in *State* v. *Davis*, 8 Ohio App. 3d 205 (1982), before being arbitrarily converted into a major premise for the opinion in *State* v. *Martin*—which is under challenge in this cause. Obviously then it is because *Martin* is now being regarded as a resolution of all debates on this issue in Ohio that this Court must literally impose its wisdom on the debaters.

Indeed it was in *Poole*, where the defense raised was that of accident, that the Court's analysis included the collateral characterization of self-defense as "justification for admitted conduct." *Poole*, 33 Ohio St. 2d at 19. This theme was then repeated in other cases including *State* v. *Davis*, where the author thereof described the defense (of self-defense) as being:

> . . . in the nature of a confession and avoidance, by which the defendant essentially admits the existence of facts which tend to establish the elements of the crime.

Id., at 209. Then along came the two *Martin* decisions, which are at the core of this cause.

In *Martin*, the Ohio Supreme Court, relying on *Poole*, has now declared that whenever self-defense is raised the accused

> . . . admits the facts claimed by the prosecution and then relies on independent facts or circumstances

> which the defendant claims exempt him from liability.

J.A. at 40; 21 Ohioi St. 3d, at 94. It is from these false premises that the Court in *Martin* then pontificates:

> Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged.

Ibid.

If this Court agrees that an accused does not necessarily admit, and surely did not admit in this case, the "facts claimed by the prosecution and then relie[d] on independent facts, to exempt . . . [her] from liability" (*Id.*, 40 and 94); then almost at once the course this case must take becomes even clearer than it might have been otherwise—if that is even possible.

This follows because to the extent the jury regarded Earline Martin as having *conceded* her acts amounted to murder unless she proved they were lawful, by reason of self-defense, then such must be viewed as having "undeniably created a burden-shifting presumption." *Francis* v. *Franklin*, ___ *U.S.* ___, *105 S.Ct. 1965 at 1973 (1985). Also see Griffin* v. *Martin*, 785 F.2d 1172, 1179-1180 (4th Cir. 1986).

Here we rely on several cases that make a most critical point, of rather cogent import, as providing formidable support for our thesis. The first of these cases is *Mason* v. *Balkcom*,[2] *669 F.2d 222 (5th Cir. 1982)*, where the Court

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[2] Another point made in *Mason* v. *Balkcom*, seems clearly to fit within the ambit of R.C. of Ohio, §2901.01 (c), which defines reflex actions as being "involuntary acts." In *Mason* it was recognized that one can shoot "reactively in self-defense with no specific purpose" (*Id.*, at 227). Also see *State* v. *Hardy*, 60 Ohio App. 2d 325, 329 (1978) and *Stoffer* v. *State*, 15 Ohio St. 47, 52-53 (1869).

addressed the contention that "by raising self-defense the defendant admitted the intent to kill" (*id.*, at 227). In very specifically rejecting this argument the Court agreed that one raising the claim of self-defense only admits in the usual case "that the killing occurred," *id.*, at 227. The other case referred to is *Ramirez* v. *Jones*, 683 F.2d 712 (2d Cir. 1982), where the Court similarly rejected the argument that "by asserting the defense of self-defense the [accused] conceded his intent [was] to kill . . ." (*Id.*, at 716).

In our case, the Ohio Supreme Court has openly declared that even more than the isolatable element of "intent to kill," which was likewise present in our case, that by claiming she acted in self-defense Earline Martin *admitted* all the other elements of the prosecution's theory as well. How this can be squared with, either, the cases cited above and being relied on by petitioner, or with fundamental criteria, will surely make even less sense *after* we receive the benefit of the State's rationalizations on the central issues in this cause.

B. Due Process Is Violated When On The Basis Of The Instructions Given The Jury The Accused Could Be Convicted As A Murderer When It Was Just As Likely He (Or She) Acted In Self-Defense.

Perhaps the most critical of all points made throughout this Brief are those made under this segment of our argument. What these points show is that it is certainly one thing for a reviewing Court to reason (as this Court did in *Patterson*) that due process is not offended when a jury convicts one as a murderer when it is just as likely they were only guilty of a lesser charge. Whereas, it is quite another for a trial judge to actully tell a jury they *must convict* even if the evidence is in equipoise on the issue of self-defense. This, of course, is actually what

happened here. For our jurors were precisely told that if they had any doubt that Earline Martin had sustained her burden of proof on the self-defense issue, then she failed to sustain it and their verdict should be guilty. Specifically the jury was instructed that:

> "If the weight of the evidence is equally balanced or if you are unable to determine which side of the affirmative defense has the preponderance, then the defendant has not established such affirmative defense."

J.A. at 21.

What makes all this so very graphic is the awareness that the imposition of the burden of proof on Earline Martin to prove she acted in self-defense made it possible for the jury to convict her even if it had a reasonable doubt on the issue of the lack of self-defense.

Equally important to this analysis is what is being regarded as a fair distillation of the single most critical holding in this Court's decision in *Patterson* v. *New York*. Specifically it is being contended that the reason there was no due process violation in convicting an accused of murder who just as likely (or not) was acting under the compulsion of extreme emotional disturbance, was because extreme emotional disturbance was not an element of the crime of murder as the same was defined in the New York statute.

Now what happened in our case is the trial judge, despite the defense objections and exceptions, expressly and unequivocally instructed the jury (as our statute, R.C. of Ohio, § 2901.05 [A] & [C] [2], requires) that the burden of proving the homicide here involved was committed in self-defense was upon the accused. On this specific point we again premise our arguments on *In Re*

Winship, 397 U.S. 358 (1970), which verifies the constitutional parameters as to the allocation of burdens of proof. It has been on the basis of our analysis of *Winship* and its lineal descendent (*Mullaney* v. *Wilbur*, 421 U.S. 684 [1975]) that, despite the contrary positions expressed by our Courts in countless other cases, and by the Sixth Circuit, we have remained strongly convinced the reliance on *Patterson* for their ultimate thesis is sorely misplaced.

As shown elsewhere, in *Patterson* the Court dealt with a New York statute that provided a gratuitous mitigation defense to an intentional killing. This defense required a defendant to show he had "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation and excuse." A killing "under [such] circumstances . . . [did] not constitute murder because . . . [it was done] under the influence of extreme emotional disturbance," which was in turn defined by a New York statute as manslaughter. (*Id.*, 432 U.S., at 198-199.) Significant here, the New York Court of Appeals had originally held there was no shifting of the burden of proof in requiring the accused to prove his crime was manslaughter—instead of murder. This was said to be so because to maintain such defense, the accused was not required to disprove any fact essential to the offense charged. So postured, the affirmative defense made in mitigation bore no direct relationship to any element of the crime of murder.

It was the above analysis that doubtless caused this Court to conclude that:

> "If the State . . . chooses to recognize a factor that *mitigates the degree of criminality or punishment*, the State may assure itself that fact has been established with reasonable certainty. To recognize at all a

> mitigating circumstance does not [the court stated] require the State to prove its nonexistence in each case in which the fact is put in issue. . . ."

Id., at 207. (Emphasis supplied.) The above analysis shows this Court in *Patterson* was only dealing with a defense that mitigated the severity of the charged offense. Stated another way, there was no contention in *Patterson* that the killing was lawful. By way of contrast whenever self-defense is the issue the contention is made that the killing was *lawful*.

Simply put then, when self-defense is raised, the accused does not seek, in the words of *Patterson*, to demonstrate "a factor that mitigates the degree of criminality or punishment" (*Id.*, 207). And, just as surely, when self-defense is raised (contrary to the situation in *Patterson*), the defense being claimed bears a direct relationship to one of the elements of the crime charged—that is, that the killing was unlawful.

Also, as we read *Mullaney* v. *Wilbur*, 421 U.S., at 698, it seems clear enough this Court did not intend that its holding in *Winship* was limited to a State's definition of the elements of its crimes. If it were otherwise, the Court would rather obviously have to be credited with failing to realize "[i]t would only be necessary [for a prosecution oriented State like Ohio] to redefine the elements that constitute different crimes" in order to avoid the requirements of *Winship*. Yet, this is precisely what Ohio has done.

For example, by eliminating "malice" from its homicide offense, as was done in R.C. of Ohio § 2903.01 *et. al.*, the effect was to substantially lessen the State's burden of proof in all such cases where self-defense is claimed. This follows because obviously when malice is an element of a

murder offense an honest but *mistaken* belief that it was necessary to use deadly force to defend one's self (from imminent peril to life or from great bodily harm) would negate the element of malice and at least reduce the offense involved to manslaughter. With malice eliminated, the offense in such circumstances would be murder.

In any event, the upshot of the combined effect of *Mullaney* and *Patterson*, both *supra*, is that while a State can undeniably require an accused to prove facts that would *mitigate* the gravity of the charged offense; *a State simply cannot require accused persons to prove themselves not guilty.* Yet, such is the unavoidable impact of an instruction that says an accused is innocent if she proves she acted in self-defense. This point gains further momentum when one fully realizes that under the self-defense charge given the jury in *Martin* and assailed herein, *if* the evidence had been, or was, in *equipoise* on the issue of self-defense, a conviction was still required. (See J.A. at 21.)

Admittedly, the criteria that distinguish this Court's holding in *Mullaney* from the holding in *Patterson* are somewhat elusive. Indeed, one of the leading scholars of this area has cogently argued that the only satisfactory reading of *Patterson* is that it overruled *Mullaney.* Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 Michigan L. Rev. 30, 36-40 (1977). The Court has not yet embraced that conclusion, however; and even if it did, as Professor Allen demonstrates the question would remain as to the meaning of *In re Winship* (. . . "we are now in the rather interesting position of having two Supreme Court decisions written within two years of one another on functionally identical statutes, one striking down and the other upholding the statutory scheme.

Needless to say, this creates some uncertainty as to what 'the law' is in this area." Id. at 36). Notwithstanding this ambiguity, every theory suggested by members of this Court or by scholars results in the conclusion that the state of Ohio has violated Petitioner's rights by requiring her to prove she acted in self-defense. We will treat these arguments in order.

ELEMENTS OF THE OFFENSE: One theory that may explain *Mullaney* and *Patterson* is that the state of Ohio mu t prove beyond reasonable doubt whatever it labels an element. As we have demonstrated, proof of self-defense negates elements of the offense of murder. Thus, requiring a defendant to prove self-defense has the effect of requiring her to disprove elements of the offense. That is clearly unconstitutional under any interpretation of the relevant line of cases.

It is also important to point out that any argument by the state of Ohio that self-defense does not negate elements, and thus that it is permissible to burden Petitioner with the proof of self-defense, must be of no avail for two reasons. First, such an argument is factually wrong for all the reasons discussed herein and in the brief of *Amicus Curiae* filed in this case. Second, even if this Court concludes that the state of Ohio has not included the absence of self-defense within its definition of homicide or that proof of self-defense negates elements of the offense, that only begins rather than ends the analysis. To say that if a fact is an element requires that it be proven beyond reasonable doubt is most definitely not to say that if a fact is not an element it need not be proven beyond reasonable doubt. Commenting on this point, Professor Allen has pointed out that "If the state may make any issue an affirmative defense, all that would be left of *Winship* . . . would be lessons in drafting. The only question remaining

would be whether the state had or had not labelled a certain fact as an element, and a constitutional common law would develop to provide resolutions of that issue. To be sure, this alternative would make sense of *Winship*, but it would do so by robbing it of any significance." Allen and DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim. L. Rev. 1, 5-6 (1982). Indeed, in *Patterson* this Court noted that there are limits beyond which a state cannot go in the construction of affirmative defenses. 432 U.S. at 210. Thus, the analysis must proceed to other matters to determine if the state of Ohio can constitutionally make self-defense an affirmative defense if this Court concludes that it has attempted to do so.

THE TRADITIONS AND CONSCIENCE OF THE PEOPLE: The Court in *Patterson* suggested that a state statute would be unconstitutional if it "offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 201-02 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958)). As we have demonstrated in this brief, and as has been further demonstrated by the *Amicus* brief in this case, the right to act in self-defense is universally accepted in this country today. A person who acts in self-defense is not excused from the consequences of an otherwise illegal act. Rather, such a person has done no wrong in the universally held view in this country and is an innocent. The state of Ohio, however, argues that it can make a person establish his own innocence by proving self-defense by a preponderance of the evidence. If that is so, then presumably the state of Ohio could also remove the "defense" of self-defense from the statute books entirely, and punish someone who acted in self-defense as

a murderer. This, we submit, would be incontrovertibly inconsistent with the traditions and conscience of the people of this country. Moreover, since self-defense cannot be eliminated from the definition of criminality, a defendant cannot be made to bear the large risk of error that is entailed when he must bear the burden of proving self-defense by a preponderance of the evidence. Just as eliminating self-defense entirely would violate the universal norms of this country, so too, we submit, would punishing a person as a murderer when it is just as likely as not that the person acted in legitimate self-defense. Accordingly, under this test, too, the Ohio statute is unconstitutional.

THE TEST OF HISTORY: Justice Powell has argued that a state cannot shift the burden of proof to a defendant on an issue that makes, and has historically made, a significant difference in punishment and stigma. *Patterson*, 432 U.S. at 216-32 (Powell, J., dissenting). Again, as we have demonstrated, self-defense is an ancient and still universally accepted defense to a charge of murder. Moreover, its establishment results in a finding of innocence that carries no stigma or punishment. This test for the unconstitutionality of the Ohio statute is thus met as well.

SPECIAL STIGMA AND PUNISHMENT: In the recent case of *McMillan* v. *Pennsylvania*, ___ U.S. ___ (1986), Justice Stevens argued that if "a state provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*." Id. at ___. Justice Stevens was distinguishing between provisions of statutes that mitigate and those that aggravate criminality, but his point applies to this Ohio statute as well. Ohio has chosen to distinguish

those who act in self-defense from those who do not (as indeed we assert the state is constitutionally required to do). Thus, under the Ohio statutes, those who act in self-defense are innocent, whereas those who do not are guilty. The only distinguishing trait is the presence or absence of self-defense. Accordingly, a special stigma, and a very harsh punishment, is provided for those individuals for whom the "component" of self-defense is not present. Regardless of the precise form of the statutes, the absence of self-defense clearly gives rise "to a special stigma and to a special punishment." On this ground, then, the state of Ohio should be required to prove the absence of self-defense beyond reasonable doubt.

PROPORTIONALITY IN PUNISHMENT: As Professor Allen has stated, and indeed why this case is presently before this Court, "the fundamental constitutional concern with protecting the defendant's liberty interest articulated in *Winship* can be fully satisfied only if the procedural safeguard of the reasonable doubt standard is linked to a substantive standard guaranteeing that the state's definition of criminal conduct is fair and does not carry the potential for disproportionate punishment." Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harvard L. Rev. 321, 343 (1980). After careful consideration of the various substantive standards that have been suggested, id. at 343-45, Professor Allen demonstrated that the most cogent explanation for the scope of the reasonable standard is that the state must prove beyond reasonable doubt each fact necessary to make the punishment and stigma imposed proportional to the offense under the eighth amendment. This argument was first constructed in Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An*

Examination of the Limits of Legitimate Intervention, 55 Texas L. Rev. 269 (1977), which this Court cited with apparent approval in *Patterson*. The position was developed further in Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 Michigan L. Rev. 30, 46-48 (1977):

> This requirement of proportionality . . . provides the means of delineating the extent of the federal interest in that reasonable doubt standard. If the courts conclude that a given punishment is not disproportional to what the state has proved beyond reasonable doubt notwithstanding the presence or absence of any mitigating factors, then a defendant's liberty interest would obviously be satisfied by a statute that required proof of only those elements and that imposed that particular punishment. Accordingly, the mere addition to that statute of an affirmative defense, which after all could constitutionally be ignored, should be equally satisfactory. The import of the proportionality principle is, then, that the state should be required to prove enough to justify the imposition of the maximum sentence permissible under the statute. Once that is accomplished, the accused has been fully protected against an unwarranted deprivation of liberty, and the state should be permitted to elaborate on the basic statute as it sees fit.
>
> The thesis that due process requires proof beyond a reasonable doubt only with respect to those elements of the offense that are "essential" by virtue of the eighth amendment concretely expresses the role of the reasonable doubt standard. It thus clarifies the dimensions of the Constitution's solicitude for the "transcendent value" of liberty—the ambiguous phrase often invoked in constitutional burden-of-proof adjudication as though it explained the result. Together, due process and the eighth amendment

protect criminal defendants from unwarranted deprivations of liberty by requiring the state to establish sufficient factual elements to justify the allotted punishment and by requiring the state, in establishing those elements, to minimize the risk of error adverse to the defendant. Once the overriding constitutional command is satisfied, however, the need for the protective procedure is likewise satisfied, and the traditional state power should be able to reassert itself, permitting the states to allocate burdens of proof as they desire.

In addition to failing to provide cognizable constitutional standards, the unadorned rhetoric of "transcendent values" provides little assurance that the results reached in cases invoking it are constitutionally required. One of the compelling attributes of the proportionality theory is that it cures this deficiency by tying the federal constitutional mandate to a relatively unambiguous constitutional command that has the further advantage of leaving the states substantially free to fashion their own policies. Moreover, it does so in such a way as to reconcile *Winship* and *Patterson* while concomitantly demonstrating the efforts of *Mullaney*. *Winship*, it is now clear, merely articulated what a state must do if a factor is a necessary element of the offense as defined by law. *Patterson*, by contrast, provides the method to determine whether a state's definition of a crime is constitutionally permissible. *Mullaney* erred in failing to inquire whether there are limits to the federal concern in the accused's liberty and reputational interests and whether the markedly different setting of *Mullaney*, as compared to *Winship*, was of any constitutional significance. *Patterson* rectified these errors, if it is viewed as embracing the proportionality concept, by making clear that although the interests articulated in *Winship* are of great importance, standing alone they are inadequate to prohibit a state's allocation of the burden of proof that otherwise is constitutional. *Patterson* makes clear, in other

> words, to what extent the factors present in *Winship* but absent in *Mullaney* are relevant to due process adjudication in this area and to what extent the accused's liberty and reputational interests are independently significant.

See also *Moran* v. *Ohio*, ___ U.S. ___, 105 S.Ct. 350, 354: "Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose 'crime,' for example, consisted in an immediate response to a murderous attack upon him." (Brennan, J., dissenting from denial of certiorari).

Application of the test of proportionality to the facts of this case is quite simple, of course. If the Petitioner acted in self-defense, any punishment would be unconstitutional, let alone the punishment actually imposed. Accordingly, under this test for the scope of *Winship*, the Ohio statute is unconstitutional.

In sum, then, each test for the scope of the constitutional interest in the reasonable doubt standard that has ever been articulated by the Court or the scholars results in the same conclusion: the Ohio statutes placing the burden of proving self-defense on the defendant are unconstitutional. Thus, unless this Court overrules *Winship* or drains it of all serious meaning, the Court must conclude that Petitioner's rights have been abridged.

Essentially the arguments relied on by the State will surely distill into assertions that the misinterpretations given by the majorities on the Courts below should be deemed conclusive on the issue. This will be said to be so because such is only consistent with a State Court's interpretation of its own statutes, which is one of its prerogatives. It is our view that this argument will surely fail to pass muster for the very obvious reason that *Patterson*

not being a self-defense case, really has to be tortured to accomodate the State's arguments.

On the other hand, any recommendation that this Court even attempt such a feat would only be made by those who remain oblivious to certain rather precise language in the *Patterson* opinion itself. For it was here that this Court stated, in clear and unambiguous language, that:

> [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause *unless* "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id., 432 U.S., at 201-202 (citing *Speiser* v. *Randall*, 357 U.S. 513, 523 [1958]). (Emphasis supplied.) And, the Court indicated further that:

> This view may seem to permit state legislatures to allocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.

432 U.S. at 210.

Since the *Patterson* decision did not define what those limits were, the decision can only be construed as holding that there is no due process violation in convicting a defendant of murder who just as likely (or not) was acting under extreme emotional disturbance. The reason being extreme emotional disturbance was not an element of the crime of murder. This, of course, is obviously quite different from the situation that arises when it is just as

likely that the accused acted in self-defense as it is that he (or she) acted with murderous intent.

Obviously then placing the burden on our petitioner to prove she acted in self-defense had the effect of "unhinging" the procedural presumption of innocence by, in effect, presuming guilt unless she proved such was not the case. Still another effect of this burden being placed on the accused is that it also undermines the privilege against self incrimination because, as noted in *Patterson*, at n. 13, it virtually forces the accused to testify.

Further support for our thesis is provided by *Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980), which contains as good an analysis of the *Winship-Mullaney-Patterson* trilogy as can be found anywhere. In that case the Fifth Circuit reckoned with a Georgia statute that put the burden on the defendant to prove the homicide involved therein was committed in self-defense. The Court found the statute to be unconstitutional. In doing so the Court held, despite a State's characterization of the self-defense issue as one involving an affirmative defense, that a State may not place the burden of persuasion on that issue upon the defendant if the truth of such "defense" would negate an essential element of the crime charged. Significantly, the *Holloway* Court has cogently reasoned that the *Mullaney* decision survived the *Patterson* decision regarding this precise holding. *Holloway*, at 626 and n. 33.

In short, it is here being submitted that the test to employ in these situations entails a "functional analysis". Thus, the mere labeling of an issue by a State legislature as an element of a crime, or as an affirmative defense, is insufficient. *Id.*, at page 628. Also, according to *Holloway*, a Court must be satisfied that a State's charac-

terization of its laws does not, by refusing to address *logical inconsistencies*, functionally operate to place the burden of persuasion on an essential element upon the defendant.

What is so significant about *Holloway* is that even though self-defense was labeled an "affirmative" defense under Georgia law, it was still considered an element of the offense because murder is an unlawful killing. And, inasmuch as a killing in self-defense is not unlawful the State was required to prove beyond a reasonable doubt that the killing was not in self-defense. This followed because a finding of self-defense would negate the element of unlawfulness.

Thus petitioner submits that the analysis of the trilogy of cases referred to in the *Holloway* case, by the Fifth Circuit, is not only compelling, well reasoned and convincing; it is thorough and logically persuasive. The upshot of the analysis being referred to is that even though Ohio has seen fit to label self-defense as an affirmative defense, it is, in fact, logically inconsistent with the truth of essential elements of the intentional homicide offenses involved in cases of this ilk.

Indeed in Ohio, and elsewhere in this country, one surely has the absolute right to defend themselves. This right is expressly guaranteed by the Ohio Constitution, in the First and Fourth Sections of its Bill of Rights. Even this is not all. Our own Court of Appeals (in still another Opinion by Judge Jackson, who also dissented below) specifically noted:

> The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, liberty or property without due process of law. Obviously, the State may not require and does not intend that an individual

> succumb to his attacker and possibly forfeit his life rather than act in self-defense.

State v. *Hardy*, 60 Ohio App. 2d 325, 328-329 (1978). Also see *State* v. *Hogan*, 63 Ohio St. 202, 219 (1900).

Thus, we have contended and shown that the right to act in self-defense, which is guaranteed by our constitutions, is invariably a lawful act. Also, "[i]t should be conceded, as an axiomatic proposition, that an indictment or information must to some manner charge the unlawfulness of the defendant's conduct." Anno., 169 *A.L.R.*, 166 (1947). (Art. IV, Sec. 20 of the Ohio Constitution likewise requires what amounts to an allegation of unlawfulness in its indictments. See *Hamilton* v. *Alvis*, 109 Ohio App. 298, 301 [1959].) As argued above, this unassailable tenet emphasizes the extent to which self-defense perforce negates unlawfulness. This being so, the lack of self defense must be regarded as an element of the homicide charge made against Earline Martin in this case.

Apart from the arguments made above, what may be a dispositive point here is really made when one pauses to realize that in *Mullaney* v. *Wilbur*, cited elsewhere, the burden of proof as to the absence of heat of passion was placed on the prosecution even though under Maine law it was specifically regarded as an "affirmative" defense. This very point was emphasized in *Griffin* v. *Martin*, 785 F.2d 1172 (4th Cir. 1986). There the Court treated the dropping of the word "unlawfulness" from the definition of certain offenses as having been done "in the interest of statutory streamlining . . . [and] did not have the purpose of achieving change of the substance," *id.*, 1183.

Also significant here, the Fourth Circuit, in *Griffin* v. *Martin*, recalled for us that "[u]nlawfulness was beyond

any doubt an essential element of murder at common law." *Id.*, at 1183, citing *Chase's Blackstone's Contemporaries*, 4th ed., 1914, pp. 941-942. (". . . The unlawfulness arises from the killing without warrant or excuse. . . .")

On this very point, we fully recognize that in *White* v. *Arn*, 788 F.2d 338, 347 (6th Cir. 1986), our Circuit Court in addressing the contention that *unlawfulness* is necessarily an element of any criminal offense in Ohio, took a contrary position. In rejecting this contention the Sixth Circuit adopted certain language from *State* v. *Morris*, 8 Ohio App. 3d 12 (1982), as the basis for doing so. Here we refer to the following segment of *Morris:*

> When the accused asserts an affirmative defense as a justification for an *otherwise unlawful act*, the burden of proving that justification can be constitutionally assigned to the accused. . . . A contrary ruling would mean that the State is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be lawful.

8 Ohio App. 3d, at 18-19. (Emphasis supplied.)

While the Court, in *White* v. *Arn*, found the above quoted language compellingly "persuasive" (788 F.2d, at 347), upon inspection it is easily shown to be a product of a fallacious or counterfeit reasoning pattern. This is so because *it simply does not follow* that if an accused did not have the burden of proving he (or she) acted in self-defense such "would mean the State is constitutionally required to disprove *every* affirmative defense." (*Id.*, at 347, citing *Morris*.) (Emphasis supplied.) So postured this patent flaw in that Court's ratiocinations unavoidably exposes the conclusion reached from the reasoning pattern relied on in both *White* and *Morris* as being a *non sequiter*. Or, a purist could very well say, the apparent flaw

involved in their rationale is more aptly labelled "the fallacy of the undistributed middle." This would be so because the conclusory statement—*i.e.*, "every defense is a justification for the conduct involved" (*Morris*, at 18-19) is invalid because it simply was *not* distributed in its essential premises. See Hairston, *A Contemporary Rhetoric*, 2d ed. (Houghton Mifflin Co., Boston 1974), p. 266-267.

Obviously then, based on the above arguments, it was unconstitutional to put the burden on Earline Martin because this required her to negate a fact, or facts, essential to the proof of the crime charged.

When the above arguments are coupled with our overall assailment of the positions the Courts below have taken on the self-defense issues are fully considered, the points made by Justices Frankfurter and Black dissenting in *Leland* v. *Oregon*, 343 U.S. 790 (1952), should really become most compelling. Here it was stated:

> [F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the eyes of the jury. It is the duty of the government to establish his guilt beyond a reasonable doubt. This notion, basic in our law and rightly one of the boasts of a free society is a requirement and a safeguard of due process of law in the historic procedural content of "due process" . . . But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death *there must be culpability to turn homicide into murder.*

* * *

> The duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt, is the decisive difference between criminal culpability and civil liability. To suggest that the legal oddity by which Oregon imposes upon the accused the burden of proving beyond a reasonable doubt that he had not the mind capable of committing murder is a mere difference in the measure of proof, is to obliterate the distinction between civil and criminal law.

Id., 343 U.S., at 802, 805.

If nothing else, all this makes the conclusion that unlawfulness is not an element of any homicide offense the product of very flawed reasoning patterns of the type this Court will surely reject. For in addition to the most obvious reasons why this is so, the rationale submitted makes even less sense when the extent to which we have to alter our understanding of basic concepts is considered.

In short, upon analysis of *White* v. *Arn* and *State* v. *Morris*, both supra, what we are really being told is the reason "unlawfulness" is not an element of any homicide offense automatically results from the fact that the Courts in Ohio having opted to place the burden of proving self-defense on the accused mandates that to the extent "unlawfulness" and self-defense coincide, unlawfulness is simply not to be regarded as an element. See Allen & DeGrazia, *The Constitutional Requirement Of Proof Beyond A Reasonable Doubt: A Comment Upon Incipient Chaos In Lower Courts*, 20 Am. Crim. L. Rev. 1, 18 (1982).

If this makes sense, it can only be because the Constitution furnished no bar to the discretion a State has to label a factual issue an affirmative defense or an element of an

offense. This follows because forcing a defendant to bear the burden of proof on the issue of self-defense is really the same, both, conceptually and functionally, as requiring the prosecution to prove the lack of self-defense. It is this irrepressible fact that makes the central issues here so vitally important. For as we see it the danger to the *Winship* doctrine could not be more serious.

CONCLUSION

Apart from all the valid and insuperable, arguments made above, the act of self-defense itself is constitutionally guaranteed as one of our inalienable rights. Indeed, as was once written by a sage of a bygone, though enlightened era, when broadly discussing this issue:

> ". . . the law cannot prevent [self defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat."

O.W. Holmes, Jr., *The Common Law*, 47 (1881).

It has also been demonstrated that the upshot of the *Martin* opinions, in both the Ohio Supreme Court and the Court of Appeals, is that the "mitigation" defense put forth in *Patterson* v. *New York*, 432 U.S. 197 (1977), which stands at the fulcrum of all of the critical positions taken in these opinions, is not properly analogized to this right of self-defense. For it is here that the State's reasoning really breaks down. This follows because the gratuitous mitigation defense raised in *Patterson* bore no relationship to guilt or innocence of the criminal act. Whereas, the claim of self-defense can hardly be viewed as a matter of legislative grace—the situation in *Patterson*.

Postured then by all of the arguments made above, the one fact that seems most incontrovertible is that, not unlike the other States in this Union, Ohio lacks the power to criminalize acts done in self-defense. This being so, it really should suffice here simply to say that any attempt to criminalize acts done in self-defense would be contrary to the:

> . . . Universal judgment that there is no social interest in preserving the lives of aggressors at the costs

> of those of their victims. Given the choice that must be made, the only defensible policy is one that will operate as a sanction against unlawful aggression.

Weschler and Michael, *A Rationale Of The Law Of Homicide I*, 37 Columbia Law Review, 701, 736 (1937).

Hopefully, then, the court will agree it is certainly one thing to tell a jury that if the accused committed certain acts her crime would be murder, *but* that they had the power to reduce the crime to manslaughter *if* the accused proved certain facts to mitigate the seriousness of her criminal act. And, it is another thing to tell the jury that to avoid a conviction for murder the accused has to *prove* her acts were not criminal and that she was justified in acting as she did.

Under the instructions given in this case, despite the due process requirements of *In Re Winship*, 397 U.S. 358 (1970) and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), Earline Martin was required to disprove the *criminal* intent element of the aggravated murder charge. And, she was required to contend with other instructions that were inconsistent and conflicting. When these insuperable flaws are augmented by other errors and the prosecutor's egregious arguments to the jury, the conclusion that Earline Martin's conviction should be reversed is really not debatable since it cannot be avoided.

As a final point, we hasten to add that in *Patterson* we were told there were limits beyond which a State may not go in defining its crimes and in the allocation of burdens of proof with reference thereto. And, while we were not told just what those limits were, a point recently emphasized in *McMillian* v. *Pennsylvania*, ___ U.S. ___ (1986), it is fair inference from what was said that a State could not, in any event, offend any principle of justice that had come to be regarded as fundamental.

Since the right of self-defense must surely be regarded as fundamental, the obvious conclusion is really hard to resist. But, if it were that simple we really would not be here. On the other hand, regardless of the hidden complexities, if any exist, one thing above all seems certain and beyond dispute. The convoluted and circuitious reasoning patterns relied on by the Ohio Courts in rejecting our various arguments are flawed almost beyond belief.

In making this latter assessment of the Opinions referred to, we borrow for emphasis a metaphor used by the majority in *McMillian* to make a significant point. Simply put, if the notions expressed by Ohio's reviewing Courts (in this cause and in others, *i.e.*, their resolution of these self-defense issues is sanctioned by *Patterson*) were valid, then truly this would be one situation in which the "tail . . . wags the dog of the substantive offense." *McMillian*, at ____.

For all of these reasons the conviction of Earline Martin must be reversed.

Respectfully submitted,

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ADDENDUM

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION—AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SELECTED SEGMENTS OF THE CONSTITUTION OF THE STATE OF OHIO:

Article I, Section I: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and . . . obtaining safety."

Article I, Section IV: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

Article IV, section XX: The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio."

REVISED CODE OF OHIO § 2901.5—BURDEN AND DEGREE OF PROOF

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of

proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * *

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

REVISED CODE OF OHIO § 2901.21—REQUIREMENTS FOR CRIMINAL LIABILITY

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

* * *

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

REVISED CODE OF OHIO § 2903.01—AGGRAVATED MURDER

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

REVISED CODE OF OHIO § 2903.02—MURDER

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

REVISED CODE OF OHIO § 2903.03—VOLUNTARY MANSLAUGHTER

(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

REVISED CODE OF OHIO§ 2929.71—ADDITIONAL THREE YEARS OF ACTUAL INCARCERATION FOR OFFENSES INVOLVING A FIREARM:

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pur-

suant to section 2929.11 of the Revised Code, if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony.